Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00438/2015**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 7 February 2018 **On 20 February 2018**

Before

RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
SITTING AS A JUDGE OF THE UPPER TRIBUNAL JUDGE
DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

RUBEN TAVERES PINTO

Respondent

Representation:

For the Appellant: Mr Melvin, Home Office Presenting Officer
For the Respondent: Mr Hawkin, Counsel

DECISION AND REASONS

1. The Secretary of State appeals against a decision of First-tier Tribunal Judge Nightingale promulgated on 11 October 2017 in which she granted an appeal against a decision of the Secretary of State dated 7 September 2015 to deport him from the United Kingdom. We shall refer to the respondent in this appeal as the appellant as he was before the First-tier Tribunal.

2. The appellant is a citizen of Portugal born on 19 July 1995. He came to the United Kingdom as a young child and there was

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documentary evidence showing that he was enrolled in primary education in September 2002. He has been the United Kingdom since then.

3. Between 4 January 2011 and 7 July 2015 the appellant was convicted of eight criminal offences, including offences against the person, more fully narrated at paragraph 2. On 18 May 2015 the appellant was convicted of conspiracy to commit burglary and on 30 June 2015 sentenced to 24 months in a young offenders' institution. On 7 July 2015 he was convicted of an offence of dishonesty and sentenced to 4 months imprisonment. Judge Nightingale records this as being concurrent with the previous sentence but the criminal record appears to show it as consecutive. Nothing turns on this point.

4. The decision to deport the appellant was made under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). The reasons are set out in a supplementary letter dated 23 September 2015. The letter noted that the appellant had not shown that he had acquired a permanent right of residence in the United Kingdom. Accordingly consideration had been given to whether or not deportation could be justified on the grounds of public policy or public security (regulations 19(3(b) and 21). The Secretary of State concluded that the order was justified.

5. One of the issues before the First-tier Tribunal was whether the appellant had resided in the United Kingdom for a continuous period of at least 10 years prior to the decision to deport. Both parties made submissions on this issue, recorded at paragraphs 34 and 35. The Home Office Presenting Officer accepted that if the appellant had made out the 10 years' residence then he could only be excluded on imperative grounds of public security (regulation 21(4)). The burden however was on the appellant.

6. Judge Nightingale found that the appellant has resided in the United Kingdom continuously since at least 2002. She continued, "*He had, therefore, by the date of his first period of detention in a young offenders' institution in December 2014, resided in the United Kingdom for a continuous period of at least 10 years. Unlike the acquisition of permanent residence under regulation 15, the Regulations do not state that the continuous period has to be calculated in accordance with the Regulations*"

7. That finding, and Judge Nightingale's interpretation of the 2006 Regulations encapsulates the issue between the parties.

8. The Secretary of State's grounds of appeal take no issue with the finding that the appellant has been in the United Kingdom continuously since 2002. It is however submitted that in order to obtain the highest level of protection in regulation 21(4) the 10 year residence must be established in accordance with the 2006

Regulations. Mr Melvin submitted that, amongst other things, this would include demonstrating that throughout this period the appellant had comprehensive health insurance. The appellant had provided no evidence that would justify a finding of continuous 10 year residence in accordance with the Regulations. The Supreme Court made a reference to the ECJ on this point; **FV(Italy) [2016] UKSC 49**. On 24 October 2017 Advocate General Szpunar had given his opinion in which he stated, at paragraph 59, *"…the acquisition of a permanent right of residence under Articles 16 and 28(2) of the Directive 2004/38 is a prerequisite for enhanced protection under Article 28(3) of that directive."* Accordingly Mr Melvin submitted that the First-tier Tribunal had made a material error of law.

9. Mr Hawkin submitted that there was no error. He pointed out that in making the reference to ECJ the Supreme Court had said that a majority of the Court favours the view that possession of a right of permanent residence is not needed to enjoy enhanced protection under article 28(3)(a) but a minority regards the position as at least unclear and so requires a reference to the ECJ. Accordingly Judge Nightingale had reached her decision on the basis of the law as it stands at present. So far as the Advocate General's opinion was concerned it was yet to be seen whether it would be adopted by the ECJ.

10. For reasons set out below we do not consider that it is necessary for us to adjudicate on this issue.

11. At paragraph 50 Judge Nightingale says this, *"It is also for the respondent to satisfy me that the personal conduct of this appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. I do not find that this has been established **even leaving aside, for the sake of argument, the appellant's ten years of residence**."* (our emphasis). That is a reference to regulation 21(5)(c) and is one of the principles with which a decision taken on grounds of public policy and public security must comply.

12. There is no direct challenge to that finding in the grounds of appeal. Mr Melvin made a valiant attempt to persuade us that ground 11 covered the point but we are not persuaded that this is so. As Mr Hawkin pointed out the ground is predicated on the assertion that the appellant's convictions showed a lack of social and cultural integration. That was not accepted by the judge. In the alternative Mr Melvin argued that this finding was infected by Judge Nightingale's error in her approach to ten year's residence. Again we are not persuaded by that submission.

13. There was in our opinion sufficient evidence from which Judge Nightingale could make that finding. It is of course true that the appellant has amassed a number of convictions detailed in Judge

Nightingale's determination. She had regard to the OASys assessment and the finding that he was a medium risk to the public though it was noted that the assessment was nearly two years old. However what clearly impressed Judge Nightingale was the evidence of his engagement with a rehabilitation programme run by Saracens Rugby Club. She heard evidence from Nick Gourlay who was involved in Saracens Education and Work Programme for Young Offenders. His evidence is detailed in paragraphs 27 to 29. The programme used sport, specifically, rugby to promote discipline, honesty and adherence to the rules. The appellant had undergone an eight week programme and had received a leadership award for his involvement. He had become a team leader on the course. At paragraph 47 Judge Nightingale assesses Mr Gourlay's evidence and concludes that the appellant has begun on the road to rehabilitation and that there would be available some support in those efforts from the Club.

14. Judge Nightingale also took into account the accepted basis of the plea on the most serious charge, the conspiracy to commit burglary. It was on the basis of having been involved on one day only in a "spur of the moment" incident. That appears to be borne out by reference to the remarks of the sentencing judge.

15. Accordingly, even if Judge Nightingale made an error of law in concluding that the appellant benefitted from the enhanced protection under regulation 21(4), and we express no opinion on the point, we are not satisfied for the reasons set out by her in paragraph 50 that the error was material.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date

Lord Boyd of Duncansby